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Auerbach, Joseph Smith

An indictment of prohibition

[S.l.]

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AN

INDICTMENT OF PROHIBITION

By
JOSEPH S. AUERBACH

INTRODUCTION.*

At the request of insistent friends, I have consented to the publication as a Volume of an *Indictment of Prohibition,* which, in part only, appeared as a magazine article during 1929.

The Article did not seek to appraise the varying claims as to the benefits or evils of Prohibition, but approached the subject from a point of view—not theretofore emphasized—that the 18th Amendment was adopted by the several States under a justifiable misapprehension on their part as to its effect,—more particularly in the matter of the meaning of the words of the Amendment "The Congress and the several States shall have concurrent power to enforce the Amendment."

It was consequently urged, among other things, that the Amendment was not, in the Court of Conscience or in the Forum of fair play binding upon the American People.

The only addition of consequence to the Article as originally written is that we—without in anywise lessening all well-directed efforts for the ultimate repeal of the Amendment—preliminarily seek to have the Volstead Act so changed as to have effect only in those States which elect to pass concurrent legislation in accord with that Act.

* When the Volstead Act is referred to in the Introduction or in the Volume, it is to be understood as including all Acts amendatory of or supplementary to that Act.

This change would mean that such States as favored the Amendment could have State Enforcement Acts, and those States not in sympathy with it could elect not to pass any such Acts, but be free to regulate the manufacture of and traffic in intoxicating beverages, within their borders.

It would be a flexible arrangement whereby each of the States might from time to time change its view and attitude toward Prohibition. For if failure to pass a State Enforcement Act did not work to the satisfaction of the State, it might pass one, and again repeal it if the desirability of so doing should be determined upon. Accordingly, as to intrastate government in relation to alcoholic beverages, exercise of the police power by the States could be asserted.

It seems to me difficult to over-emphasize the benefits of this privilege to the Nation as well as to the States; and, for the time being, political parties might, to their advantage, it would seem adopt such a plank in their platforms as a substitute for insistence exclusively upon adherence to or repeal of the 18th Amendment.

The reasons why this legislation would be valid are briefly set forth at page 23 *et seq.* of the Volume—briefly, for little or no argument is necessary to establish its validity.

As said at pages 22 and 26:

> Among other things, the States, not thus subject to the Volstead Act, could then fix upon a restriction of alcoholic content in liquors, in

> accordance with a wise policy. They could accord freedom to the worthy physician to prescribe such liquor as he deems requisite to the treatment of the patient, pursuant to such regulations as would operate to eliminate any substantial diversion of medical liquor to prohibited beverage purposes. They could forbid the return of the Saloon, and, by all other prudential methods, initiate a new era of Temperance which shall supplant intemperate and intolerable Prohibition.
>
> It is difficult to see how the Dry States could object to such a limitation of the Volstead Act, for they could have their local Enforcement Acts as drastic as the National Act with the severest criminal penalties for the introduction of intoxicating beverages within their borders.
>
> The only dissent therefore from such a proposal must be confined to the zealots in those Dry States, who would arrogate to themselves the moral right and duty to regulate by mandatory legislation the personal conduct of all citizens of the Union, and save them from alleged sin. Fortunately, however, the professional altruist, especially in the domain of Prohibition, is not overmuch in favor during these days of our disillusionment.

There are two outstanding radical proposals as to the Eighteenth Amendment:

I. Repeal of the Eighteenth Amendment, very generally and persistently advocated by the foes of Prohibition, among whom I am to be numbered, and which, in the end, should be effected.

II. Repeal of the Volstead Act, to which there can be no valid legal objection.

With each of these proposals I am in distinct sympathy; but it is reasonably clear that neither of such results could be brought about within so prompt a time as the suggested limitation of the Volstead Act to States which shall pass Enforcement Acts of like import with that Act.

For the repeal of the Amendment—though the most desirable of all plans of dealing with Prohibition—involves delay, with the accompanying doubt that the requisite number of States might not yet be prepared to vote for it. And one reason for this delay is that no agreement has yet been reached as to the phraseology of the repeal, and this is by no means easy to formulate. Moreover, the adoption of the plan for amendment of the Volstead Act, so as to limit its operation to those States which pass such concurrent Enforcement Statutes, need in no wise interfere with the laudable efforts, now meeting with distinct progress, of a complete repeal ultimately of the Eighteenth Amendment. **On the contrary it ought to further the success of such efforts.**

Let us never forget, however, that if in our fervor the requisite votes of Convention or Conventions—to be assembled in accordance with the provisions of our Constitution—be prematurely sought and not obtained and the proposed repeal be defeated, the plight of the American People would indeed be desperate. For a renewal of the attempt to secure the assent of three-fourths of

the States for repeal would, in all probability, not be feasible for a generation to come, during which period we should still be shackled with the fetters of Prohibition.

Today the Dry hosts are discomfited if not demoralized and seemingly prepared for compromise; and within a reasonable time, as the campaign of enlightenment proceeds, they should be in retreat and perhaps in rout. But let us be very sure that there are still no treacherous places on the way over which we must go to victory. We can afford to tolerate some further delay, however humiliating it may be; we cannot afford to blunder through over-confidence.

Then, again, as to the suggested repeal of the Volstead Act, it is difficult to see how Congress could be persuaded to leave the admittedly Dry States without the benefits of the Eighteenth Amendment, which it might be insisted would be lost to them through such repeal.

It may be claimed that this proposed limitation of the Volstead Act is not, even for the moment, an ideal disposition of the menacing evils wrought by Prohibition and not dictated by the "counsels of perfection,"—since the 18th Amendment is wholly out of place in our organic law.

While we may be prepared to concede the forcefulness of the claim, we can, for our profit—without in anywise surrendering our unalterable determination to rid ourselves of the 18th Amendment—have recourse to the arresting words of Edmund

Burke in his imposing speech when moving his resolutions for Conciliation with the Colonies: "All government, indeed every human benefit and enjoyment, every virtue, and every prudent act, is founded on compromise and barter."

Oftener than we realize we need for our guidance, in the world of politics as well as in the world of affairs, the practical inspiration of Walt Whitman's utterance:

"I am afoot with my vision."

April, 1930.

AN INDICTMENT OF PROHIBITION.

The discussion which follows has little in common with numberless presentations of the menacing evils of the Prohibition enforced upon us by the 18th Amendment and the Volstead Act; for in the main, it is an arraignment of the culpable political manœuvers whereby this ominous adventure of Government became possible of adoption by the States.

The President of the United States—to whom we should still wish to concede a discerning outlook, generally, upon governmental affairs—has characterized Prohibition as an "experiment noble in motive"; but this view is not acquiesced in by its opponents nor even by all its advocates.

Yet whatever be our varying views as to such motive, it will be sought to make clear that in vital respects, the proposal and adoption of the 18th Amendment were not more creditable than have been its interpretation and enforcement under the Volstead Act. And if the correctness of this be established surely we all would desire to be on our guard lest we approve of results, however worthy, secured by indefensible methods.

Before, however, entering upon any recital of those methods it should be emphasized that they far exceed in significance any question as to the motive actuating the promotion of Prohibition. For motives are, as a rule, not the criterion where-

by rights are to be admeasured; at times they are not even persuasive, much less controlling; and again they are to be wholly ignored.

In a leading case in our Courts where a transaction was adjudged to be violative of an equitable principle, the Court of last resort refused to permit judge or jury to pass upon its advantages or upon the alleged laudable purpose with which it was entered into—for the reason that "real motives often elude the most searching inquiry"; and if we cast loose from the safe moorings of this rule of law and reason, we are adrift in the unstable waters of sentiment and conjecture.

Then, too, it is to be remembered that even though many citizens of distinction were impressed, as President Hoover seemed to be, with the laudable character of these motives, it was primarily not they who made Prohibition possible. For while our country was dedicated to the winning of the Great War—and apathetic almost towards aught else—while hosts of Soldiers of the Union were on the battlefields of France; while Mr. Hoover himself was abroad, serving both his own land and the world with a rare devotional spirit and ability, an implacable, overwrought group, under a brilliant, resourceful leadership, effectuated an astounding, momentous and wholly misapprehended change in the Constitutional Government of our traditions. And as one reads the autobiographic story of that relentless warfare, as published in the *New York Times* some years ago,

the conclusion is irresistible that—in association with any fervor of purpose, which doubtless was to some degree present—there was the dominant lust of triumph.

Nevertheless, some contributions by devotees of the Dry Faith go even so far as to applaud the methods resorted to in bringing about Prohibition; and, on the contrary, André Siegfried says in *America Comes of Age:*

> "It is, however, openly admitted that Congress voted under direct and formidable pressure from the Anti-Saloon League, which was clever enough to impose its own wording of the law and to obtain most of its demands. Its agents had carried on an ambitious and vigorous campaign in different constituencies and had even gone as far as blackmail. In some cases, with the aid of detectives, they had unearthed the private life of the local Congressman, noting his debts, his moral weaknesses, and any stains on his reputation. Then they were in a position to order him to vote as he was told or be exposed."

With such assertions, which are measurably conjectural, or at least not susceptible of proof, this discussion has little or no concern. It does not primarily seek to set up any balance sheet as to the advantages and disadvantages of Prohibition; nor does it treat overmuch of the mooted question whether violation of the *malum prohibitum* and of the *malum in se* is of equal gravity.

It seeks rather to focus attention upon the fact that in the adoption of the Amendment and passage of the Volstead Act—along with its unconscionable provisions of favoritism referred to later —the States and the People of this country were misled to their prejudice; and that we have, in organic law and Federal statute, enactments which vest in our Government, powers never wittingly conferred upon it.

And, pursuant to familiar equitable principles, results secured through misrepresentation by one party to an undertaking, or even through justifiable misapprehension on the part of the other, are not binding upon the contracting party that is misled. Ill-gotten gains are not to be regarded as sacrosanct property, even when possessed by a national government.

This, too, should be added by way of introduction. Until the determination of the Prohibition cases, in which I appeared as advocate, my refusal to write on the subject of Prohibition will be understood. Now, however, I have consented to present the views which follow, that are addressed neither to irreconcilable Drys nor irreconcilable Wets, but to the unprejudiced, reasonable citizen, anxious for the well-being of Society and of the State.

Admittedly, the 18th Amendment was directed against the drunkard over the bar, and the social and economic ills asserted to follow from over-indulgence in intoxicating liquors for beverage

purposes. It deals with no other subject. For the Amendment is:

> SECTION 1.—After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.
>
> SECTION 2.—The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Yet, the Amendment has been so interpreted by the Volstead Act that the people of this country are denied the enjoyment of liquors *not* intoxicating *and also the ministry of the physician according to his trained judgment.*

Moreover, by reiterated word and deed States have made clear their misunderstanding of "Concurrent Power," whereby under the Volstead Act it has been determined that they bartered away their birthright of Statehood without even receipt of the proverbial potage of lentils. And the minority opinions of the Supreme Court in the *National Prohibition Cases* justify such a conclusion with inexorable logic.

The truth of this misunderstanding is further fortified by the fact that *no contrary views were expressed in the prevailing opinion on this point,* nor, for that matter, on the merits of any other point involved in those cases. For the Court

contented itself with a mere "announcement of conclusions," without assigned reasons—although before that Court leaders of the American Bar had, for days, argued in support of contrary conclusions.

Chief Justice WHITE, in concurring with the majority, expressed his solemn disapproval of the course adopted:

> I profoundly regret that in a case of this magnitude, affecting as it does an amendment of the Constitution dealing with the powers and duties of the national and state governments, and intimately concerning the welfare of the whole people, the court has deemed it proper to state only ultimate conclusions without an exposition of the reasoning by which they have been reached.

Slight wonder that States still adhere to the conviction and contention that they wholly misapprehended the legal significance now attached to "Concurrent Power"!

And it will shock many a citizen to realize that the Amendment has now the startling effect as if, among other things, it had read:

> SECTION 1.—After one year from the ratification of this article the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. *And intoxicating liquors shall be deemed to be*

> *those which contain an alcoholic content in excess of one-half of one per cent.*
>
> SECTION 2.—The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation; *but this concurrent power shall not entitle the several States to any voice in the determination as to what is appropriate legislation.*
>
> SECTION 3.—*The Congress shall have jurisdiction over medicinal liquor and be authorized to prescribe the dosage to be administered to the patient by the physician even by enema, and to require that prescriptions shall betray in writing the malady of the patient, but shall be forbidden to legislate as to the manufacture or consumption of sacramental intoxicants.*

It is preposterous to insist that any such Amendment could have been adopted—even though legalized poisoned alcohol, so-called double jeopardy, the felony enforcement statute, Congressional applause for the murder of suspected violators of Prohibition and the recently proposed enforcement of a Federal Statute through what has, not inappropriately, been characterized as legislative blackmail, were not remotely dreamt of.

If these truths can be brought home to the People of the United States, our Government surely cannot honorably remain in smug and defiant possession of rights, the title to which is forfeit in the Court of Conscience. Yet, up to the present, many a member of the legislative branch of our Government seems to have a conception of

honor, not markedly dissimilar from that to be found in Falstaff's fantastic soliloquy in *King Henry the Fourth.*

Or perhaps it is no question of honor, but, as some insist, mere solicitude concerning the admonishing crack of the whip or even cut of the lash of the Dry Cause, in legislative lobby and nominating convention. Adopting the phrase of Whistler we might say such legislators have the courage of other peoples' opinions.

As stated, the fact is notorious—so notorious that it is idle to question its existence—that when the Amendment was proposed for adoption no thought was in the mind of legislatures or citizens generally that it would forbid the use for beverage purposes of liquors *not* in fact intoxicating.

There was the thought, too, in the minds of many, that "intoxicating liquors" were to be interpreted in their trade sense as distilled spirits, and not as beer or fermented wines. But assuming this latter suggestion not to be wholly warranted—though the Congressional debates and reports of Congressional Committees amply justify such an inference —it can be confidently said that the People of this country were shocked, when Congress acted upon the assumption that a roving commission had been conferred upon it to commit the wrong of enacting the one-half-of-one per cent. limitation of alcoholic content.

As to medicinal liquor, the indictment of Prohibition has "counts" in it to which the most resourceful of casuists cannot demur in attempting to sustain the usurpation by Congress of an "arbitrary and unreasonable control" over the healing art. For when the Amendment was proposed for adoption, it was accompanied by a concurrent resolution from the Senate Judiciary Committee defining what would be its effect upon medicinal liquor.

In the noted *Lambert* case in which I was Counsel, Judge KNOX—in holding unconstitutional Section 7 of the Volstead Act, which limits the physician's prescription for a patient to a pint of distilled liquor in any ten days, no matter how critical be his condition—said:

> "As bearing upon what was sought to be accomplished through the instrumentality of the Eighteenth Amendment, I quote from the Report of the Senate Judiciary Committee, dated June 11, 1917, in which the adoption of a concurrent resolution submitting amendment to the States was recommended. * * *
>
> "'National law, enacted under an amended Constitution, could prohibit transportation and sale, *and in concurrence with like legislation by the States (the union of the power of the Nation and the power of the States)*, thus securing the entire strength of the whole community, could soon put an end to the traffic. * * * Alcohol would still be manufactured, distributed and sold under the restrictions appertaining to other poisons; *and its use as a medicine and in the arts would not be interfered with.* * * *'"

And Judge KNOX added:

> *"I have little or no doubt that it was the impelling force and reasonableness of the thought expressed by the foregoing quotation that brought about the submission of the Amendment to the several States and was responsible for its ratification by forty-five of them."*

This promise, thus held to have been relied upon by the States, was deliberately departed from. For the prohibition is complete, and the physician who prescribes for a patient more than a pint of liquor in any ten days becomes a criminal, though the ministry be for alleviation of pain, the prolongation or even the saving of life.

Moreover, the conclusions of eminent medical authorities submitted to the Supreme Court in the *Lambert* case are that, notably in febrile cases, where the stomach may resent the reception of food, the amount of alcoholic liquor required is often as much as a pint a day for arresting the disease. And, more than this, these authorities disclose the fact, undisputed on the argument and indisputable, that there are times when medicinal liquor cannot be taken as a beverage, but must be administered by *enema.*

So that today, a constitutional amendment—admittedly aimed, as above stated, against the drunkard over the bar and the social and economic ills asserted to be the accompaniment of over-indulgence in intoxicating liquors—has been interpreted to mean that a physician shall not alleviate the pain or save the life of a patient, by the prescription of more than a pint of liquor in any ten days, *even though the liquors are to be administered by enema!*

It will profit us all to know who were before the Supreme Court in the *Lambert* case.

As to Dr. Samuel W. Lambert, it was held that "he is a man of great distinction in his profession and of wide and unusual experience in the practice of medicine." He had alleged by his complaint the utter inadequacy, in his opinion, of the pint-in-ten-days-prohibition; *and under the pleading interposed by the Government, this fact was admitted.*

There was, too, before the Court the recorded dissent of the Association for the Protection of Constitutional Rights—of which Dr. Lambert is President—composed of hundreds of outstanding physicians and surgeons.

Finally there was before the Court the American Medical Association with its nearly one hundred thousand membership. For this Association had been permitted to file its *Amicus Curiae* Brief of protest against the ignominious fetters forged by Congress to shackle a great profession in its ministry to the afflicted.

It is to be borne in mind, too, that among the members of that profession thus before the Court were those who believed in Prohibition rightly arrived at, and even some who were doubtful of the

therapeutic value of alcohol in the treatment of disease. But they were consecrated to the thought that the worthy physician, who did believe in its efficacy, was not to be denied the right of exercise of his individual judgment. The pleas, though unsuccessful, were not without avail since the rallying word of the dissenting opinion, below quoted from, bade patient and physician be of good cheer. For they were conscious that, more than once in our history, the dissenting opinion has wrought popular uprising and legislative reform.

Meanwhile what is the duty of a physician towards a patient requiring more intoxicating liquor than he can legally prescribe? Is there any doubt that it is to tell the family or friends of the need of the patient? Is there any doubt that in consequence the liquor is legitimately or illegitimately secured? And can such mandatory course be condemned other than by unreason masquerading in the livery of a discredited Statute?

To make humiliation come full-circle to patient and physician alike, the Volstead Act requires that, *for the inspection of some possibly malevolent Government employee*, every prescription must betray the malady of the patient, *who thus no longer can make confidential communications to his medical adviser.*

To such a pass have the People of this land and a great Profession come!

Concerning the one-half-of-one-per-cent definition—characterized by a distinguished Federal

Judge as "a legislative lie"—the specious claim was made in Congress that, if the alcoholic content were not thus negligible, in all likelihood it would be increased to an intoxicating content. The claim was without merit, since the apprehended danger could be avoided by appropriate, drastic regulations, requiring, among other things, that the liquor go directly from producer to consumer and not be permitted to enter the channels of trade, through the saloon or otherwise. This regulatory legislation in the interest of justice would, however, have necessitated some slight trouble, and accordingly the Volsteadites took the summary short cut to injustice.

Again, as to medicinal liquor, the hazard of its diversion to beverage purposes is alleged as the justification for limiting the prescription of the physician to one pint of distilled liquor in any ten days. The minority opinion of the Supreme Court, nevertheless, held, as had Judge KNOX, that regulations—*which, as appeared in the Lambert case, the physicians had themselves proposed*—would reasonably prevent that diversion. And the traps these proposed regulations set for the abhorrent bootlegging doctor had teeth in them, for they would subject the offender to the pains and penalties of imprisonment as well as of fines.

Yet even if the hazard of diversion were not negligible but substantial, the prohibition against the physician is, according to that minority opinion, wholly without warrant. The right to heal, and reciprocally the right to be healed, is a

constitutional privilege. Even though we assume the hazard to exist as to medicinal liquor and that the bootlegging doctor would seek to ply his despicable trade, if free to prescribe more than a pint of liquor in any ten days, this is no valid answer to the denial of such rights. We cannot, and do not, thus annul constitutional guaranties, as Congress has done in the Volstead Act.

We do not have to seek far for an illustration of the appropriate method of dealing with a constitutional right, the unregulated exercise of which may be unjustified. Article Second of the first Ten Amendments to the Federal Constitution, is:

Right of People to Bear Arms Not to Be Infringed.

> A well regulated militia being necessary for the security of a free State, the right of the people to keep and bear arms shall not be infringed.

And though this has been judicially interpreted as binding only on the National Government, States in their Constitutions or Civil Rights Acts have like restrictions, or the right is to be enjoyed in the absence of any enactment.

As in the case of intoxicating liquor, there is the danger of diversion of the firearm to unlawful purposes, but fraught with much more serious consequence than diversion of medicinal liquor to the party of hilarity or even the orgy. For diversion of the firearm may mean murder.

The armored car that parades our streets is eloquent testimony to this menace. Yet the people of this country are not, by reason of this hazard of diversion of the weapon to murderous purposes, deprived of their right to possess arms. In the securing of them the individual must merely submit himself to an inquiry by the public authorities for a determination whether the application is for worthy purposes. If the facts establish this, he must be accorded the permit. The exercise of the right is subject merely to the salutary and sane regulation.

A recent case in the United States Supreme Court still further emphasizes this principle. The State of Pennsylvania had forbidden the use of shoddy in manufacture—claiming, in defense of the legislation, that it was a necessary enforcement feature for prevention of deception and for protection of health. The Supreme Court summarily disposed of such contention:

> "Constitutional guaranties may not be made to yield to mere convenience * * *. The business here involved is legitimate and useful, *and while it is subject to reasonable regulations*, the absolute prohibition of the use of shoddy in the manufacture of comfortables, is purely arbitrary, and violates the due process clause of the Fourteenth Amendment."

It is for recognition, by the Amendment and the Volstead Act, of the principle thus again authoritatively announced, that representative citizens

have been pleading to Congress, for years, and are still pleading, but in vain.

Then, too, what can be said in defense of legislation which, for political expediency, had the effrontery to "play favorites" after the following fashion?

While, as pointed out, the Volstead Act prohibits the physician from prescribing what he deems vital for the needs of the patient, it places no limit upon the right of "Priest, Minister or Rabbi" to sacramental intoxicants—though it is notorious that the hazard of their diversion to irreligious beverage purposes is at least as pronounced as in the case of medicinal liquor.

For the Act specifically provides that "it *shall not be held to apply to the manufacture, sale, transportation, importation, possession, or distribution of wine for sacramental purposes or like religious rites.*" The Priest, Minister or Rabbi presents his requisition for such intoxicants, and the sole question is whether he is or is not Priest, Minister or Rabbi. If his calling is established, he becomes forthwith entitled to them under such regulations as may be fixed by the Executive Department.

As to such scandalous discrimination, Judge KNOX says:

> So far as the sacramental use of wine is concerned, there is no specific limitation of the quantity that may be purchased and consumed. Instead of manifesting the same solicitude for the physical well-being of a person suffering from a disease (other than alcoholism), the proper treatment of which demands more than a pint of liquor within ten days, that it evinced for the spiritual comfort and welfare of members of certain religious sects, Congress restricted in the manner complained of, the medicinal use of intoxicating liquor.

Unctiously sluice out, with lavish political hand, intoxicating beverages to ritualist and communicant, but deny to the sick and the dying the ministry of the physician!

There is, too, this rather equivocal episode in the Prohibition story.

In the so-called Transportation Cases, the Supreme Court, to the surprise of many a lawyer as well as layman, held it to be a violation of the transportation clause of the Amendment and the Volstead Act for ships to come into the ports of this country with intoxicating liquors, *although sealed and placed in charge of a Federal agent at the three-mile limit.* Thereafter, for months, foreign liners were obliged to jettison at the three-mile limit all liquors unconsumed on the voyage. The cup of the Drys must then have been overflowing with a joy that was intoxicating!

But the end was not yet. For later we entered into a Treaty providing that *in consideration of our governmental right of search being extended beyond the three-mile limit*—by courtesy it should be termed Prohibition's Right of Search—"no

penalty or forfeiture should be applicable or attach to" liquors transported under seal or to vessels carrying them.

Yet they were thus transported at the date of the Court's decision, *with the added security of the Federal agent's charge.* Accordingly the Treaty was in effect a nullification of the Amendment; or if it was not this, then every such vessel that enters our harbors flouts the mandate of the Supreme Court, and can be libeled by the United States Attorneys.

The learned Justice who wrote the prevailing opinion in these cases—for there was an expressed dissent in an arresting minority opinion—cited with approval from another Prohibition case language somewhat colloquial but nevertheless quite comprehensive: 'It is obvious that those whose *wishes and opinions* (*sic*) were embodied in the Amendment, meant to stop the whole business.' That part of the "business," however, which was passed upon in this case was not, as we now know, put an end to, but on the contrary proceeds gayly upon its transportation way.

Nor ought we to be in much doubt as to what the Supreme Court, with its judicial power over Treaties, would be likely to say of the constitutionality of any such Treaty, if ever by chance before it for adjudication.

The executive and legislative branches of our Government and their designated representatives are exclaiming against violations of the Volstead Act—termed in the so-called Jones Felony Enforcement Act as *"casual or slight violations"* (*sic*), whatever this may mean, in such a criminal Statute. Yet it would seem that, in their leisure moments, they might well direct some of their vehemence to this fundamental violation of the Amendment and Volstead Act, as determined by the Supreme Court in the *Transportation Cases* referred to.

Surely it was not by over-laudable tactics that this Treaty was entered into in order to avoid the consequences of the decision in those cases, wherein Mr. Justice SUTHERLAND, by his dissenting opinion, pointed out its possibly menacing effect upon our international relationships.

A rather messy affair at best is, in racing parlance, this in-and-out performance of Prohibition.

An unamiable person might give it quite a different characterization.

With all these evils on the head of Prohibition, is it surprising that the consequent lack of respect for Amendment and Volstead Act does not lessen but on the contrary increases?

In a recent illuminating article on *Prohibition and Reconstruction,* President Lowell of Harvard depicts the hopeless demoralization and corruption proceeding from Prohibition; and the foreboding conditions he sets forth, to use his own forceful phrase, strike at the root of our civil life.

Everywhere the present day carping *laudator temporis acti* and *castigator censorque minorum*

of Horace—or perhaps he is not now the captious critic—has much to say of prevalent evil tendencies in this country. Yet none but the astigmatic or blind can have the hardihood to deny that many of such tendencies are directly traceable to popular mutiny over the interpretation of the 18th Amendment by the Volstead Act.

If the demand be sufficiently emphasized by mandatory memorials, with millions of signatures, which could be secured, Congress must in the end, submit to Conventions of the States—as may be done under our Constitution—a new Amendment which shall say what it means and mean what it says. For Article V of the Constitution provides:

> "*Ways in which the Constitution can be amended.*—The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress. * * *"

If submission thus be to Conventions of the States, debate and contest over selection of Delegates would leave no room for misapprehension as to the extent of the proposed surrender to

the Federal Government of the rights,—including the Police Power,—reserved to the States under the Tenth Amendment to the United States Constitution.

The preparation of such an Amendment should enlist the patriotic cooperation of sane Drys as well as Wets, in and out of Congress, and would amply requite all the solicitous labor bestowed upon it. For the whole subject of Prohibition, in the light of our lamentable, loathsome experience, would pass under review, as a new enactment was deliberated over and agreed upon—not in subservience to fad or obsession of a group, but for the well-being of a people.

Then, after an arbitrament of the People, which has not yet been had, we shall have in substitution for the Prohibition rancor and violence of the past decade, peace and temperance and a return to the ways of decency and dignity in our national life.

More than this will result if we are aroused to the gravity of the occasion for action. For we can have for inspiration the enshrined words of Lincoln, as we covenant with ourselves that our nation shall have a new birth of freedom and that government of the people, by the people and for the people shall not perish from the earth. To realize that such an attitude is not perfervid in thought or expression, we need but steep ourselves in the spirit of Lincoln's utterances during the Douglas debates and elsewhere, concerning the *Fugitive Slave Law* and the *Dred Scott* decision.

Then we shall know abundantly that the despotic and insolent rule of Prohibition has no kinship with the free and representative government, over which Lincoln brooded and for which he strove with his life.

Meanwhile, however, the Volstead Act should be amended in its enforcement features so that it is made applicable to all federal territory and jurisdiction and to such states as pass concurrent acts. Such an amendment would conform to the 18th Amendment and would more accurately reflect present day public opinion.

This would mean that such States as favored the 18th Amendment could have State Enforcement Acts in accord with the National Act; and those States not in sympathy with it could elect not to pass any such Acts, but be free, at their option, to regulate the manufacture of and traffic in intoxicating beverages within such seemly limitations as they might determine upon.

Among other things, the States not thus subject to the Volstead Act could then fix upon a restriction of alcoholic content in distilled liquors, in accordance with a wise policy. They could accord freedom to the worthy physician to prescribe such liquor as he deems requisite to the treatment of the patient, pursuant to such regulations as would operate to eliminate any substantial diversion of medical liquor to prohibited beverage purposes. They could forbid the return of the Saloon and, by all other prudential methods, initiate a new era

of Temperance which shall supplant intemperate and intolerable Prohibition.

There can be no doubt that this power of amendment resides in Congress.

Admittedly the ten years which have passed since the enactment of the Volstead Act have demonstrated the unworkable features of parts of the Act, an ever increasing remonstrance against the character and extent of its provisions and of Acts supplementary to it, and a crying need for the proposed amendment.

The Congress which passed the Volstead Act had no power to control or hamper the wisdom of subsequent Congresses, and accordingly the Act has been variously supplemented in certain respects. The power to amend *and even to repeal the Volstead Act* is inherent in the present Congress precisely as it is in respect of any other federal statute.

The particular amendment suggested is in harmony with Section 2 of the 18th Amendment, which provides that Congress and the several States shall have concurrent power to enforce the article by appropriate legislation. It would be no objection that Congress had before, in enacting the Volstead Act occupied the more extended field and in so doing has compelled a broad construction by the Supreme Court of concurrent power. Let it be granted that when Congress chooses to legislate to the exclusion of the States on the subject of Prohibition it may do so and that the Supreme Court, to avoid conflict between state and federal statute

must recognize the predominant power of Congress; yet Congress nevertheless is not forced by anything in the 18th Amendment to go to the last dim boundary of its power. *In fact, under the permissive provisions of Section 2 of the Amendment, Congress was under no obligation to pass any enforcement Act.* And even after it has availed itself of the more extreme power there is no obstacle to bar its return to a recognition evidenced in the very terms of the 18th Amendment that the States may, if so permitted by Congress, exercise concurrent power.

The subject is wholly within the jurisdiction of Congress, for as said by the Supreme Court in a leading case on the interpretation of the 18th Amendment:

> "In itself the Amendment does not prescribe any penalties, forfeitures or mode of enforcement, but by its second section leaves these to legislative action."

Nothing extreme or unprecedented is involved in the suggestion, since justification for it may be found in analogous cases. The Constitution, for instance, grants to Congress the power to pass laws on the subject of bankruptcies. And when Congress has occupied the field, state statutes on the subject are suspended. Congress has not only enacted bankruptcy laws; it has repealed them so that state statutes on the subject have again come into operation, until such time as Congress has again passed other bankruptcy laws. This principle was authoritatively determined in the leading case of *Sturges* v. *Crowninshield* in the Supreme Court of the United States; and it would be merely cumulative to add extended references of like import from its other decisions.

And if Congress now, in response to a mandatory public opinion, should see fit to recognize the concurrent power of the States expressed in Section 2 of the 18th Amendment, certainly no court could with justification hold that the recognition was itself such a conflict as referred to above.

For the United States Supreme Court in still another notable case—the so-called double-jeopardy case—has gone so far as to hold that an amendment of the Volstead Act would be "proper" *even to avoid the double-jeopardy incident to that Act.*

The Court, in construing Section 2 of the Amendment, said:

> "The second section means that power to take legislative measures to make the policy effective shall exist in Congress in respect of the territorial limits of the United States and at the same time the like power of the several States within their territorial limits shall not cease to exist."

The Court concluded that a man might be twice tried and convicted for the same offense—once under a State statute and again under the National Act. The validity and propriety of amendment,

however, were then volunteered in the following language:

> "If Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can, of course, do so by proper legislative provision; but it has not done so."

And the Court further held that the bar to such cumulative prosecution would thereupon apply even though the State were—in the language of the decision—to forbid the manufacture, transportation and sale of intoxicating liquors merely by "small or nominal fines."

In the light of these judicial determinations, any claim of unconstitutionality or invalidity urged against such an amendment to the Volstead Act—which Congress it must always be remembered was not required to pass—would be wholly lacking in seriousness.

It is difficult to see how the Dry States could reasonably object to such a proposal, for they could have their local Enforcement Acts as drastic as the National Act, with the severest criminal penalties for the introduction of intoxicating beverages within their borders.

The only dissent, therefore, from such a course of procedure must be confined to the zealots in those Dry States, who would arrogate to themselves the moral right and duty by mandatory

legislation to regulate the personal conduct of all citizens of the Union and save them from alleged sin. Fortunately, however, the professional altruist —especially in the domain of Prohibition—is not overmuch in favor during these days of our disillusionment.

There is at present no method of dealing adequately with the question of Prohibition except by a change in Volstead Act or by repeal of the Amendment. For against a militant and very audible minority, a majority of the Supreme Court —from a compelling sense of judicial duty the legal profession is bound to assume—has upheld the Government in practically all its contentions on the subject, except in the so-called *Street* case. In that case, wherein I was Counsel, the Court reversed the judgment below and held that liquor lawfully purchased might be kept by the owner outside of his home in a private warehouse,—the test of legality being not the place where the liquor was possessed, but the conditions under which it was acquired.

In other particulars there is little probability that any change of judicial view will soon take place in the interpretation of the Volstead Act, although the Supreme Court has more than once revised its views. An instance of this was in cases arising under the so-called Sherman Anti-Trust Act. In those cases it was held originally that the restraint of trade referred to in the Act meant practically any restraint of trade, *irrespective of its extent*

or character; and it was not until later that this view was departed from and the "rule of reason" adopted, whereby its extent and character were held to be of primary importance.

Perhaps we may hereafter have the judicial benediction of another Rule of Reason; but for the moment, recourse must be had to Congress. And one of the grounds for the demand should, in addition to those recited, be the admittedly hopeless disrespect in which the law is held. For how could it be otherwise regarded, when the man on the street corner hears more or less unamiable references even to the courts for their decisions affecting Prohibition?

Mr. Elmer Davis, the seasoned scholar and trenchant author, in a recent article concerning Prohibition, *What Can We Do About It,* speaks of "the weather eye which the Supreme Court seems to keep on public opinion," and, further, that "the Supreme Court is proficient in beating the devil around the stump when he needs beating."

If it be thought, as some persons will think—and I am among the number—that such language is lacking in certain accepted amenities of discussion, many laymen claim to find for it excuse, if not justification, from the minority opinions of the Courts themselves.

For the Courts are criticized not alone by the layman, for their disposition of cases under the Volstead Act. In a case which arose after the *Street* case referred to, the majority opinion of the Supreme Court declined to extend to intoxicating liquors stored in a public bonded warehouse the protection from governmental confiscation accorded to those stored in a private warehouse. Thereupon, the acrimonious expressions of the dissenting opinion were without even scant courtesy towards the prevailing opinion.

When the *Lambert* case was on argument before the Circuit Court of Appeals, one of the Judges, in rather abrupt comment upon the plea of counsel that Section 7 of the Volstead Act prohibiting the physician from prescribing more than a pint of liquor in any ten days was so arbitrary and unreasonable as to be unconstitutional, said: How can you expect me to agree with you in this, when the Supreme Court itself has upheld "a legislative lie" in the definition of intoxicating liquor?

Again, in the *Lambert* case, before the Supreme Court, the dissenting opinion, written by Mr. Justice SUTHERLAND, and concurred in by Justices BUTLER, MCREYNOLDS and STONE, had this to say concerning the pint-in-ten-days-prohibition:

> *"This observation does more than beg the question,—it indulges an assumption the exact contrary of that which the record conclusively establishes;* for the limitation of quantity is not only unsupported by any legislative finding that it is reasonable, but it *is in flat opposition to the only facts appearing in the record which bear upon the question of what is a permissible prescription, and, therefore is without rational basis, resting alone upon the arbitrarily exercised will of Congress.* I do

not see how it can be held otherwise *without completely ignoring the case as made and constructing and considering another and different case.*

* * * * * * *

"By the legislation now under review, the authority of Congress is so exercised that *the reserved power of the states to control the practice of medicine is directly invaded, to the illegitimate end that the prescription and use of liquors for medicinal purposes is prohibited.*

* * * * * * *

"Congressional legislation directly prohibiting intoxicating liquor for concededly medical purposes, therefore, does not consist with the letter and spirit of the Constitution, and viewed as a means of carrying into effect *the granted power is in fraud of that instrument, and especially of the Tenth Amendment.*"

It would seem, as we read such caustic comments, as if we were back in the turbulent, epoch-making days of the *Dred Scott* decision.

It must accordingly be no occasion for surprise that there should be increasing popular dissatisfaction with judicial conclusions arrived at by majority opinions with such accompanying censure from members of the Bench itself.

Nor can the statement be successfully challenged that in the Forum of fair play many a worthy, law-abiding citizen, rightly or wrongly, condones evasion or at least avoidance of the Prohibition laws by calling to mind the reprehensible political and fanatical devices, whereby rabid

prohibition was made possible in this country. And the foreign visitor of distinction and character to our shores commends this attitude, as he expresses sympathy for the plight in which we are floundering.

Only at long intervals has the United States appropriated to itself power or property to which it was not entitled.

Ruthlessly and without warrant we "took" from the Republic of Colombia the Panama Canal Zone, and years after the seizure we paid millions of dollars, as amends for the perpetrated wrong. No doubt it was desirable for us to secure an inter-ocean waterway, but there are many—and they are not visionaries,—who insist it would have been better for vessels to round Cape Horn till the end of time, than that we should have shortened the route by the practices with which we were charged.

In a very real sense, a not dissimilar situation is before us now, for the United States has taken from the States and the People rights with which they never knowingly parted. And to the extent that this wrong can be righted, reparation should be made freely and promptly, if only for the reason that it may not serve as an accepted precedent for other wrongs, and that one forbidding page of our history be blotted out. Surely the States and People of this country are entitled to a restoration of their rights quite as much as was Colombia to the money we paid her.

The danger from all such acts of usurpation, if unatoned for, is not alone in themselves, but great danger lurks in the condonation of them; for it is an accepted rule of ethics, that punishment in the court of conscience unlike that in courts of law, lessens with each repeated and unrebuked offense. And it must be a matter of grave concern that we do not deaden our sensibilities as a people to that which makes for righteous national conduct.

Is good faith or the salutary rule that rights secured by A from B, through misapprehension of the facts by B, are voidable, to apply to layman and lawyer, and not to the Sovereign State?

In a well known case, the Surrogate of New York County had on the *ex parte* application of counsel, who failed to divulge all the facts, made an order which, on being apprised of the truth, he forthwith vacated. The Appellate Division restored the original order. It so happened that I was retained to argue the appeal in the Court of Appeals; and that Court overruled the Appellate Division, and with inspiriting words, held that the *Caveat Emptor* rule of the market place was not to invade the Temple of Justice and masquerade there as *Caveat Judex.*

Is the answer of our Government to the claim of States and of citizens that they were misled to their prejudice in adopting the Amendment, to be a cynical and audacious refusal of restoration—either by a true arbitration through submission of

the proposed new Amendment, or by an instant amendment of the Volstead Act so as to confine its provisions to those States which shall pass statutes of like import with that Act?

Can the United States take the abhorrent attitude that the candor required of the individual in private intercourse with his fellows or of counsel with the Court is not a prerequisite of national acquisition of rights?

Are dealings of the State with the National Government to be subject to a new rule of *Caveat Civitas?*

Scarcely ever in the history of our country has a more urgent occasion arisen for dealing with a national emergency by a courage which, in the words of William Lloyd Garrison, must be as harsh as truth and as uncompromising as justice. It must, however, be a courage, not manifested in irate, misdirected energy—which often is a sorry substitute for inertia—but a courage that is well-informed and defiantly militant.

We have too long been prone to indulge in smiles and shoulder-shrugging over the Prohibition menace or have been apparently, and perhaps actually, indifferent to it; and not a few of us have been timorous as well.

We need for our guidance some such creed as

> Rightly to be great
> Is not to stir without great argument,
> But greatly to find quarrel in a straw
> When honor's at the stake.

And we need, too, what Hamlet could not summon to his command, the resolve and fortitude to make practices conform to professions.

To the good fortune of the Republic we seem at last aroused to action. And under disciplined leadership millions of patriotic men and women. quickened to the service of a great cause, must, as stated, stand ready by mandatory memorials to Congress, and, by all other seemly but resolute ways, to press their views in the interest of justice that cries out for recognition. And in their ranks should be found hosts of the temperate Dry contingent that are not to be libeled by being classed with the zealot Drys, who like Ephraim of old are joined to idols and who in Scriptural phrase should be let alone.

Failure on our part to volunteer in such a movement might well be interpreted as an admission of unresponsive citizenship or as acquiescence in Emerson's assertion that the timidity of our public opinion is our disease.

Even Congress, one would think, should welcome the end of the Dry Reign of Terror with its political guillotine, under the shadow of which our National Legislature seems content to live its life.

Finally, this remains to be said: The thought in the minds of some ardent prohibitionists, may be that we shall not have in this country, under the new order, Prohibition in any form approaching present conditions. This happily will be true, but

we can well afford to welcome the risk that defensible temperance be substituted for indefensible Prohibition. Of course there need be no such accompanying risk; yet if there were, Heaven forbid that we consent to have rights filched from us, because of some possible resultant disadvantage in the assertion of them!

In a noted case before the Supreme Court of the United States, the question at issue was the right of maintaining a suit in ejectment against property—which happened to be Arlington Heights—held under color of title for account of the Federal Government.

In the course of the argument, one of the Justices, with rather querulous voice and manner, suggested somewhat irrelevantly to plaintiff's Counsel that a decision of the Court in favor of his client might establish a precedent, whereby the Government at a future time could be ousted from land used for a lighthouse, which thereupon might be dismantled,—thus exposing lives and property to new perils of the sea.

The memorable and all-embracing answer of the advocate was:

Better, your Honor, that the Lighthouse never should be lighted than that the Light of the Law should be put out.

The contention of counsel prevailed; and if we hold fast to the conviction that moral causes, when fearlessly and persuasively presented, triumph in the end, we may be very sure that this cause of

righteousness and justice will prevail against the usurpations of Prohibition.

How can the result be otherwise, since to our good fortune, there is in this land no final court of appeals except that Tribunal of last resort—The People's Will—which, at the behest of aroused, instructed and valiant public opinion, issues its inexorable decrees of justice whereto men and political institutions and even courts—under the now accepted rules of law—must yield allegiance.

Only the question remains, whether the People in their sovereign right will understandingly repair to that Tribunal.

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